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In The

# Supreme Court of the United States

October Term, 1998

STATE OF NEBRASKA,

*Petitioner,*

v.

AARON PATTNO,

*Respondent.*

**On Petition For Writ Of Certiorari To The Nebraska Supreme Court**

## PETITION FOR WRIT OF CERTIORARI

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38 pp

## QUESTION PRESENTED

Does the reading of a Bible verse by a judge during sentencing violate due process where the State's highest Court has specifically found that the sentence imposed is fully supported by the evidence in the record and is within statutory limits?

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## OPINIONS BELOW

The opinion of the Nebraska Supreme Court (App. 1-15, *infra*) is reported as *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998). The sentencing proceedings of the District Court of Sarpy County, Nebraska are not reported.

## JURISDICTION

The opinion and judgment of the Nebraska Supreme Court was entered on June 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(A). The State timely filed a Motion for Rehearing on June 15, 1998. The Nebraska Supreme Court overruled the Motion for Rehearing on July 22, 1998 (App. 16).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

## STATEMENT OF THE CASE

The defendant, Aaron Pattno, a 25-year-old male, pled guilty to the charge of sexual assault of a 13-year-old child.

The facts in the record establish that Pattno became acquainted with the 13 year-old victim (hereafter referred to as M.B.) through an internet chat room prior to Christmas 1996. Pattno and M.B. routinely sent E-mail to one another and subsequently met face to face at a park in M.B.'s neighborhood. Thereafter, Pattno and M.B. often went shopping, to the movies, or to the mall. M.B.'s parents had never met nor heard of Pattno and were unaware of any of this activity.

M.B. stayed overnight with Pattno on several occasions without his parent's knowledge. On April 12, 1997, M.B. told his parents that he was going to stay overnight with a friend (PSI, pp. 13-14). During that evening, he and Pattno sat on Pattno's bed and began kissing and hugging. Pattno grabbed M.B. on the crotch area outside of his pants. They then removed their clothing and engaged in french kissing. Pattno began "fondling and playing with [M.B.'s] penis." (PSI, p. 13). Pattno had an erection but did not ejaculate. This activity lasted for about 25 minutes (PSI, p. 13). Previously, on April 4, 1997, Pattno rented a room at a Days Inn. He and Pattno engaged in similar activity on that evening (PSI, p. 14).

This activity was discovered, Pattno was arrested, and pled guilty to sexual assault on a child. Pattno continued to have contact with M.B. even after his arrest for sexual assault. In fact, subsequent to his arrest, but before sentencing, Pattno followed M.B. and his family when they went on vacation to Lake Okoboji, Iowa (PSI, p. 16). During this vacation, M.B. would tell his parents that he was going for a bike ride or for a walk. M.B. would then secretly meet with Pattno (PSI, p. 16).

During the investigation police executed a search warrant at the residence where Pattno was staying. Pattno's computer was confiscated. On the computer's hard drive, police discovered a substantial number of E-mail messages exchanged between M.B. and Pattno (PSI, p. 67).

In some E-mail messages Pattno and M.B. discussed getting married. In an E-mail dated April 8, 1997, Pattno writes to M.B.: "Our love is not acceptable to the general public, not only because we are the same sex, but because of our age. They say that a minor does not have the mental capacity to make a decision about love and things of that nature, but you have proven that wrong." (PSI, p. 72).

The results of Pattno's testing on the Sexual Adjustment Scale can be found on page 54 of the PSI. The report states that "This client's response pattern on the Child Molest Scale is in the Problem Risk (70th to 89th percentile) range. Problematic Child molest behavioral (pedophilia) indicators are present . . . This client's responses indicate pedophile tendencies." (PSI, p. 54). Also troubling is Pattno's statement that he believed M.B. "took advantage of him because he wanted to help children." (PSI, p. 16).

The PSI also contains substantial information regarding the damage caused to M.B. and his family by Pattno's crime. In the victim impact statement, M.B. stated that the incident affected his school work and his friendships. A letter from M.B.'s parents to the district court (PSI, p. 17-19) relates the family's pain regarding Pattno's crime.

Prior to pronouncing sentence, the Court quoted the following passage from the Bible:

> Ever since the creation of the world his invisible nature, namely, his external power and deity, has been clearly perceived in the things that have been made. So they are without excuse; for although they knew God they did not honor him as God or give thanks to him as God, but they became futile in their thinking and their senseless minds were darkened. Claiming to be wise, they became fools, and exchanged the glory of the immortal God for images resembling mortal man or birds or animals or reptiles.
>
> Therefore God gave them up in the lusts of their hearts to impurity, to the dishonoring of their bodies among themselves, because they exchanged the truth about God for a lie and worshiped and served the creature rather than the Creator, who is blessed for ever [sic]. Amen.
>
> For this reason God gave them up to dishonorable passions. Their women exchanged natural relations for unnatural, and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error.

The Court then stated that it had considered the information contained in the record, and thereafter sentenced Pattno to 20 months to 5 years imprisonment. Sexual Assault on a Child is a Class IV felony and is punishable by a maximum of five years imprisonment. Pursuant to Nebraska law Pattno would have become

parole eligible after serving ten months and was subject to mandatory release after 2½ years, if no good time had been lost.

In reviewing the sentence imposed by the district court, the Nebraska Supreme Court stated that "Pattno's sentence is clearly within the statutory limits and generally, in view of such facts [on the record], would not be an abuse of discretion." 254 Neb. at 743, 579 N.W.2d. at 509.

Nonetheless, the Court vacated the sentence and remanded the cause for resentencing by a different judge. The Court concluded:

> Because the trial judge interjected his own religious views immediately prior to sentencing, a reasonable person could conclude that the sentence was based upon the personal bias or prejudice of the judge. If a judge's comments during sentencing could cause a reasonable person to question the impartiality of the judge, then the defendant has been deprived of due process and the judge has abused his or her discretion.

*Id.*

Upon remand, Pattno was sentenced to four years probation. Pursuant to Nebraska law, a probationer is "in custody under sentence." *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992). This court may still exercise jurisdiction over this case pursuant to the doctrine of collateral consequences, as enunciated in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). Further, this is a case capable of repetition yet evading review. *Moore v. Ogilvie*, 394 U.S. 814 (1969).

## REASONS FOR GRANTING THE WRIT

The Nebraska Supreme Court's decision is contrary to decisions from the highest courts of other states which have held that judicial reference to the Bible does not violate due process where the evidence in the record supports the sentence imposed.

More importantly, this decision will have the effect of allowing criminal defendants, state prosecutors, and parties in civil litigation to investigate and inquire into a judge's religious beliefs in order to disqualify the judge or to have a conviction or sentence set aside.

The Nebraska Supreme Court said, in effect, that due process is violated if the sentence is affected or may have been affected by this sentencing judge's religious beliefs. If there is a constitutional right to a sentence uninfluenced by a judge's religious beliefs, then it follows that there is a right to inquire into a judge's religious beliefs. Otherwise there would ordinarily be no way to determine whether a sentence might have been affected by that sentencing judge's religious beliefs. This intrusion on the privacy and religious freedom of judges is not required by the Constitution and should be rejected by this Court in no uncertain terms.

The proper constitutional test of whether a sentence is excessive is to examine the statutory penalty, the facts of the crime, and the defendant's record to determine whether the sentence was an abuse of discretion. An inquiry into the judge's religious beliefs is neither required by due process nor is it constitutionally allowable since it would violate a judge's freedom of religion.

Left uncorrected, the Nebraska Supreme Court's decision will lead to extensive inquiry into the religious practices and beliefs of each individual judge in Nebraska's State court system, and threatens the religious freedom of judges everywhere.

**A. The issue of whether a sentence which is clearly supported by the record can violate due process presents an important question of federal constitutional law which has not been, but should be, decided by this Court.**

The Nebraska Supreme Court explicitly found that Pattno's sentence was "clearly within the statutory limits and generally, in view of [the facts of the case], would not be an abuse of discretion." 254 Neb. at 742, 579 N.W.2d at 509. Nevertheless, the Court held that the Due Process Clause mandated that Pattno's sentence be vacated and the cause remanded for resentencing by a different district judge. The State of Nebraska submits that a sentence which is overwhelmingly supported by the evidence in the record cannot violate the Due Process Clause and should not be disturbed on appeal regardless of personal comments from the sentencing judge, including quotations and references to scripture. The issue raised in this case involves an important question of federal constitutional law which has not been, but should be, decided by this Court. That question is, can a criminal sentence which clearly "fits the crime committed" constitute a denial of a defendant's due process rights?

In the present case, the Nebraska Supreme Court abandoned its customary excessive sentence analysis and instead fashioned a "reasonable person" test to determine

whether the sentence was "based upon the judge's personal bias against Pattno's sexual orientation." Under this "reasonable person" test, Pattno needed to demonstrate that "a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual prejudice was shown."

This "reasonable person" test was derived from a line of cases involving recusal of judges. To justify its adoption of this standard, the Nebraska Supreme court explained that the federal courts had consistently applied the same standard to determine whether a judge was biased against a defendant. The court further noted that "[p]ursuant to 28 U.S.C. § 455(a) (1994), a judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown."

The Nebraska Supreme court then applied this guilt phase test to excessive sentence cases, pronouncing that "[i]f a judge's comments during sentencing could cause a reasonable person to question the impartiality of the judge, then the defendant has been deprived of **due process** and the judge has abused his or her discretion." A criminal defendant may now have his sentence overturned by merely demonstrating that a "reasonable person" could question the judge's impartiality, even if no actual bias or prejudice can be proven, and even where the evidence in the record supports the sentence imposed.

The State submits that due process considerations did not require reversal of Pattno's sentence. There is no question, and the State does not dispute, that the constitutional guarantee of due process continues to operate through the sentencing phase of a criminal case. See *Gardner v. Florida*, 430 U.S. 349 (1977). In *Gardner*, however, this Court noted that "[t]he fact that due process applies [at sentencing] does not, of course, implicate the entire panoply of criminal trial procedural rights." 430 U.S. at 358, footnote 9. It is therefore clear that the level of process due at sentencing is somewhat less than that afforded during the guilt determination phase of a trial. In fact, this court has long upheld the broad discretion afforded judges in imposing sentences. For instance, in *United States v. Tucker*, 404 U.S. 443 (1972),this Court held that as a general proposition, a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." 404 U.S. at 446. "Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence of guilt in determining what sentence to impose on a convicted defendant." *Nichols v. United States*, 511 U.S. 738, 747 (1994) (*quoting Wisconsin v. Mitchell*, 508, U.S. 476, 485 (1993)).

In *Chapman v. United States*, 500 U.S. 453 (1991), this Court stated:

> Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant

> constitutional guarantees. But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.

*Id.* at 465 (citations omitted). A sentence authorized by statute is thus constitutional unless it is cruel and unusual "and so long as it is not based on an arbitrary distinction" which violates due process.

The Nebraska Supreme Court erred in concluding that due process considerations required the reversal of Pattno's sentence. The Court's formulation of the reasonable person standard was based upon an unsound application of the Due Process Clause. At the guilt determination phase of a criminal trial, a criminal defendant is constitutionally entitled to an impartial judge, as one of the bedrocks of our judicial system is the defendant's presumption of innocence. The same due process considerations which make the reasonable person test appropriate at the guilt determination phase do not exist at the sentencing phase. At the sentencing phase of the proceedings, the defendant has been found guilty and the "presumption of innocence" no longer exists.

Societal disapproval of a criminal defendant's violation of the law is expressed through punishment via our criminal justice system. Likewise, it is not a violation of the constitution for a sentencing judge to demonstrate displeasure towards the defendant. In fact, in *Liteky v. United States*, 510 U.S. 540 (1994), this Court stated that

"expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women even after being confirmed as federal judges, sometimes display" do not establish bias or partiality.

The Court also stated:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings. . . .

*Id.* at 1155 (emphasis added).

This Court also quoted Judge Jerome Frank, who stated, "Disinterestedness does not mean child-like innocence. If a judge did not form judgements of the actors in those courthouse dramas called trials, he could never render decisions." *Id.* (*quoting In re J.P. Linahan, Inc.* 138 F.2d 650, 654 (CA2 1943)). Further, the very use of the term "reprehensible" by this Court indicates that a judge's comments upon completion of a trial need not be limited to "legalese" or the phraseology of the criminal code, nor must they be devoid of moral comment. *See also United States v. Bakker*, 925 F.2d 728, 740 (4th Cir 1991) ("To a considerable extent a sentencing judge is the embodiment of public condemnation and societal outrage.")

The present case exemplifies the difficulties with utilizing a "reasonable person" test in a sentencing context.

As this Court explained in *Chapman*, a criminal sentence is constitutional so long as the penalty is not cruel and unusual, and so long as it is not based on an arbitrary distinction violative of due process. The way to determine whether or not a sentence is based on an arbitrary distinction is to examine the sentence imposed and the evidence supporting that sentence. In the present case, although the sentencing judge referred to a Biblical passage which related, in part, to sexual perversion, there was no evidence that action prejudiced the defendant. On the contrary, there was overwhelming evidence in the record to support the sentence imposed.

The Nebraska Supreme Court expressly acknowledged that the evidence supported the sentence. Moreover, Pattno's sentence was well below the maximum sentence allowable for a Class IV felony. This militates against any inference that the judge had some religiously based bias against Pattno which **resulted** in the imposition of a questionable prison term. If allowed to stand, the Nebraska Supreme Court's holding would in the name of due process require judges to function as amoral automatons whose sentencing pronouncements must be censored of any reference to moral turpitude, need for rehabilitation, or protection of the public health, safety, welfare, and morals. The Nebraska Supreme Court's interpretation of the Due Process Clause was erroneous, and the State of Nebraska submits that this case presents an important question of federal constitutional law which should be decided by this Court.

**B. The Nebraska Supreme Court's decision has potentially far-reaching consequences which could lead to extensive inquiry into the religious beliefs and practices of each judge in Nebraska, and threatens the religious freedom of judges everywhere.**

The Nebraska Supreme Court's decision could have far-reaching negative consequences for the judicial system and society. In essence, the Nebraska Supreme Court has added a new federal due process requirement that the sentencing judge not be, or appear to be, affected by any religious belief in considering the sentence to be imposed. This test is unworkable in practice and will allow criminal defendants, state prosecutors, and parties in civil litigation to investigate and inquire into a judge's religious beliefs in order to disqualify the judge or to have a conviction or sentence set aside.

For example, if a judge is of a religious faith that supports the concept of capital punishment as the appropriate punishment for premeditated murder, could the judge be disqualified from a death penalty case? On the other hand, if the judge is of a religious faith that is completely opposed to capital punishment, could the State disqualify the judge by proving the judge's religious affiliation? What if the judge in the present case had imposed exactly the same sentence, but had decided not to read the Bible verse? His religious views would presumably be no different either way. If the sentence had been upheld, then the defendant, in a post-conviction proceeding, could depose the judge to obtain an admission from the judge that, in his view, homosexuality is a sin pursuant to his understanding of the Bible. Would the

sentence therefore have to be set aside upon postconviction review given the new due process requirement?

As these examples reveal, the court's decision could lead to extensive inquiry into the religious practices and beliefs of each individual judge in Nebraska's state court system. The due process clause of the United States Constitution does not require that judges be unaffected by any personal religious views in carrying out their duties. Constitutionally requiring that a judge be either devoid of religious belief or entirely unaffected by the religious belief she or he does have is an exercise in futility, and a violation of the First Amendment. Such a requirement would impose a religious test on judges, a test of nonreligion, which would be contrary to the provision of the United States Constitution which expressly prohibits religious tests. See U.S. Const. art. VI.

Every judge is affected by his or her life experiences. Judges form their world views based upon factors such as their upbringing, education, and religious beliefs. All of these factors shape a judge's decisions to some extent, even if the judge is unaware of it in a particular case. Religious belief is one of the most powerful influences in the lives of judges who have a strong religious faith. Religious beliefs may include concepts of mercy and forgiveness as well as sin and punishment.

It will never be possible to separate a judge's decisions from her or his life experiences or her or his religion. The attempt to do so would violate the religious freedom of judges and would greatly damage our judicial system by opening up every judge in every criminal case to being deposed about her or his religious beliefs to

determine whether those beliefs might have affected the sentence that judge imposed.

It may be argued that all the Nebraska Supreme Court really said was that due process prohibits the reading of a Bible passage at sentencing because of the "appearance" of religious influence. However, **if the "appearance" of religious influence violates due process then surely actual religious influence also violates due process.** Such influence can generally only be determined by deposing the judge and his fellow worshipers and the clergy of the judge's church, synagogue, or other religious institution.

Taken to its logical conclusion, the Nebraska Supreme Court is, in essence, saying that any Biblical or religious reference by a judge in a criminal sentencing proceeding violates due process. This Court, however, has long held that a statute does not violate the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions." *Harris v. Mr. Ra*, 448 U.S. 297, 319 (1980) (*quoting McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). Similarly, judicial reference to traditional ethics, values, or scriptures which coincide with the law of the State of Nebraska, is not prejudicial to a defendant whose conviction and sentence are based on evidence presented in court, and whose sentence is within the statutory guidelines. The concepts of "prejudice" and "bias" involve the pre-judging of an individual or case. The law does not prohibit a judge from commenting on or chastising reprehensible criminal behavior at a sentencing. *See Bakker*, 925 F.2d at 740 ("As the community's spokesperson, a judge can lecture a defendant as a lesson to that defendant and as a deterrent to others.").

In short, due process can be fully satisfied by appellate review of a sentence based upon the statutory penalty, the facts of the crime, and the defendant's record. If the facts of the record support the sentence, no inquiry of the sentencing judge's religion should be allowed. If it appears that a defendant's sentence is **disproportionate to the crime committed**, and there is evidence that said sentence may have resulted from judicial bias (religious or otherwise), reversal of the sentence may be appropriate as a penalty **based** on an arbitrary distinction.

This is not simply Nebraska's problem. If the religious freedom of judges is not protected, and if judges must swear under oath that their religion has no affect at all on them except when they are off duty, then a test of nonreligion has been imposed on public officials and the religious freedom of every citizen is threatened.

### C. The Nebraska Supreme Court's holding is in conflict with decisions from other appellate courts which have upheld criminal sentences challenged on the basis that the sentencing judge quoted scripture or made references to the Bible.

In *Poe v. State*, 671 A.2d 501 (Md. 1996), the defendant was sentenced to life imprisonment plus a 30 year consecutive sentence as a result of convictions for murder and attempted murder. The defendant appealed, arguing that "the trial judge sentenced him based upon the judge's own personal religious or moral standard, and in spite of any evidence to mitigate punishment." *Id.* at 505.

At sentencing the judge expressed his irritation with "liberal philosophy," and stated that he still believed "in

good old-fashioned law and order, the Bible, and a lot of things that people say I shouldn't believe anymore." *Id.* The appellate court noted that in terms of imposing sentences, "a trial judge's discretion is limited only by constitutional standards and statutory limits." *Id.* It added that "[t]he ultimate determination must not be motivated by ill-will, prejudice, or other impermissible considerations." *Id.*

The Maryland Supreme Court upheld the sentences. It concluded that, "Although the trial judge made statements regarding his own moral and religious beliefs, he also properly considered all mitigating factors and imposed a sentence that was well within the scope of the trial judge's authority. Accordingly, we find no error in Mr. Poe's sentence." *Id.*

In *People v. Cooper*, 486 N.W.2d 689 (Mich. 1992), the defendant was originally sentenced to 100 to 200 years in prison for second degree murder. This sentence was vacated and the case was remanded for resentencing because the sentence constituted an impermissible life sentence. At resentencing, the judge commented that, "We have some intellectuals on our Supreme Court who decide that that person can live a certain number of years and they can't live beyond that, I will have to resentence him." *Id.*

The judge then referred to the Book of Genesis, whereby it stated that the days of a man's life "shall be 120 years." *Id.* The defendant was thereafter resentenced to 75 to 150 years imprisonment. The Michigan Supreme Court denied the defendant's application for leave to appeal his sentence, despite the trial judge's reading of

the Bible. *See also Gordon v. State*, 639 A.2d 56 (R.I. 1994) (application for postconviction relief denied where trial judge's reference to Bible during sentencing in no way suggested any religious bias on the part of the judge.)

## CONCLUSION

Interpreting due process to require that state and federal judges be entirely unaffected by their religious beliefs in performing their duties violates their freedom of religion, imposes a religious test (i.e. nonreligion) and necessarily leads to serious inquiries of a judge's religion by litigants appearing before that judge. To avoid this result, this Court should grant this petition to clarify that due process requires only that a sentence be objectively reasonable based upon the evidence in the record, without regard to the religious views of the judge.

Respectfully submitted,

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STATE OF NEBRASKA, APPELLEE, V.
AARON T. PATTNO, APPELLANT.

___N.W.2d___

Filed June 5, 1998. No. S-97-1147.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

2. **Sentences.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

3. **Judges.** The Nebraska Code of Judicial Conduct demands that judges conform to a higher standard of conduct than is expected of lawyers or other persons in society.

4. _____. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

5. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.

6. **Judges: Recusal.** A judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.

7. **Judges.** Statements of religious expression by a judge or remarks which suggest that the judge dislikes the crimes committed by a defendant do not necessarily evidence improper bias or prejudice.

8. **Courts: Sentences.** Courts are well advised to rely upon the statutory guidelines for imposing sentences.

9. **Judges: Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.

10. ___:___. A sentencing judge has broad discretion as to the source and type of information, including personal observations, which may be used as assistance in determining the kind and extent of the punishment to be imposed.

11. ___:___. A judge who relies upon his or her personal religious beliefs as a basis for a sentencing decision injects an impermissible consideration in the sentencing process.

12. **Judges: Sentences: Due Process.** If a judge's comments during sentencing could cause a reasonable person to question the impartiality of the judge, then the defendant has been deprived of due process and the judge has abused his or her discretion.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Sentence vacated, and cause remanded for resentencing.

Marc B. Delman, for appellant.

Don Stenberg, Attorney General, and David T. Bydalek, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

## NATURE OF CASE

Aaron T. Pattno pled guilty to sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 1996), a Class IV felony. He claims that the sentence imposed was excessive because the judge read a passage from the Bible during sentencing which disparaged homosexuality and, therefore, manifested bias against Pattno because of his sexual orientation.

## SCOPE OF REVIEW

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

## FACTS

Pattno, a 25-year-old male, met a 13-year-old boy referred to as "M.B." through a "chat room" on the Internet. Pattno met secretly with M.B. for several months, and the two made plans for two overnight visits. During the second overnight visit, Pattno and M.B. kissed, undressed, and fondled each other.

On August 12, 1997, Pattno pled guilty to sexual assault of a child. A presentence investigation (PSI) was requested by the trial judge. The PSI revealed that Pattno had numerous traffic violations, including speeding, license suspension, and driving without an operator's license. Pattno had also been charged with writing bad checks on two occasions in 1996. Pattno had participated in a Big Brother/Big Sister program; worked for the Latch Key Program for the bicounty YMCA in Belleville, Illinois; and taught seventh graders in a religious education program. The PSI disclosed no prior history of child molestation or sexual assault.

A "sexual adjustment inventory" conducted on Pattno indicated signs of pedophilia. The report stated in part: "This client's response pattern on the Child Molest Scale is in the Problem Risk (70 to 89th percentile) range. Problematic child molest behavioral (pedophilia) indicators are present. Review court-related records carefully for prior sex-related offenses or convictions."

The PSI did not contain a sentencing recommendation because Pattno did not meet the threshold requirements to be considered for "Intensive Supervision Probation." The PSI did indicate that if probation was selected by the trial judge, certain terms were recommended. The report recommended that Pattno not be allowed to have unsupervised contact with anyone under the age of 16 and that he continue counseling, complete an offender's work program, tour the Lincoln Regional Center, and refrain from having a personal computer or any other electronic device that could be used to access electronic communications in his home.

A search of Pattno's home following his arrest disclosed pornographic material on the hard drive of his computer showing males, some teenagers, in erotic poses. Several e-mail communications between Pattno and M.B. were also discovered. The e-mail suggested that Pattno and M.B. shared a mutual affection for each other. There is evidence which suggests that Pattno continued to have contact with M.B. even after he was arrested. Pattno allegedly went to the town where M.B. and his family vacationed and secretly met with M.B. There is no evidence which discloses that Pattno and M.B. had sexual contact after Pattno was arrested.

During sentencing on October 31, 1997, the trial judge noted that Pattno had met the victim over the Internet, and the judge then read a portion of Pattno's police statement. The statement contained details about the romantic relationship which had developed between Pattno and M.B., in addition to Pattno's account of the sexual contact with M.B.

Subsequently, the trial judge read the following biblical excerpt:

> "Ever since the creation of the world his invisible nature, namely, his external power and deity, has been clearly perceived in the things that have been made. So they are without excuse; for although they knew God they did not honor him as God or give thanks to him as God, but they became futile in their thinking and their senseless minds were darkened. Claiming to be wise, they became fools, and exchanged the glory of the immortal God for images resembling mortal man or birds or animals or reptiles.

> "Therefore God gave them up in the lusts of their hearts to impurity, to the dishonoring of their bodies among themselves, because they exchanged the truth about God for a lie and worshiped and served the creature rather than the Creator, who is blessed for ever [sic]. Amen.
>
> "For this reason God gave them up to dishonorable passions. Their women exchanged natural relations for unnatural, and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error."

Following the reading of the biblical passage, the trial judge stated that he had considered the circumstances of the case and the "nature . . . of the defendant" and found that imprisonment was necessary to protect the public and not to depreciate the seriousness of the crime. Pattno was sentenced to not less than 20 months' nor more than 5 years' imprisonment.

## ASSIGNMENTS OF ERROR

Pattno claims the trial judge erred by expressing his religious views during sentencing, by expressing a bias against Pattno's sexual orientation during sentencing, and by not recusing himself from the sentencing.

## ANALYSIS

Our ultimate determination is whether the trial judge abused his discretion by imposing a sentence that was based upon the judge's personal bias against Pattno's

sexual orientation. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unjustly deprive a litigant of a substantial right and a just result. *State v. Chojolan*, 253 Neb. 591, 571 N.W.2d 621 (1997).

Pattno argues that this court should presume that the trial judge was biased because his statements during sentencing violated the Nebraska Code of Judicial Conduct. The Code of Judicial Conduct demands that judges conform to a higher standard of conduct than is expected of lawyers or other persons in society. *In re Complaint Against Empson*, 252 Neb. 433, 562 N.W.2d 817 (1997). Pattno relies upon Canon 1 ("A Judge Shall Uphold the Integrity and Independence of the Judiciary"), Canon 2 ("A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities"), Canon 3 ("A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently"), and Canon 3B(5) ("A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so").

In summary, Pattno alleges that the trial judge violated the Code of Judicial Conduct and imposed a sentence which constituted an abuse of discretion. Pattno contends that the judge pronounced the sentence in a

manner which raised a question as to whether the judge's personal bias affected the severity of his sentence. Pattno argues that his clean criminal record, the unlikelihood of reoffense, and the circumstances surrounding his crime suggest that probation was an appropriate punishment.

A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997). In Nebraska, there is no clear rule regarding the proof a litigant must present before a judge is found to be biased. In some instances, we have held that actual bias must be shown. In other instances, we have allowed the litigant to presume that the judge was biased if the appearance of impropriety was present.

In *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), the impartiality of a judge was at issue when, prior to sentencing, the judge initiated an ex parte communication with the parents of the murder victim. The issue was whether the ex parte meeting caused the judge to have "some preconceived opinion or disposition toward the sentence to be imposed. . . ." *Id.* at 853, 420 N.W.2d at 702. We held that the ex parte communication raised questions about the judge's impartiality and that, therefore, the judge had to recuse himself if requested to do so by the parties.

In *Franks v. Franks*, 181 Neb. 710, 150 N.W.2d 252 (1967), we suggested that the appearance of impropriety may be sufficient to persuade a judge to disqualify himself. We stated that the proper administration of the law

demands not only that judges refrain from actual bias, but that they avoid all appearances of unfairness.

However, in *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989), we held that there must be a showing of actual prejudice before a judge will be declared biased. In *Ellefson*, the defendant, following his conviction, wrote letters to the judge, generally declaring that he had been wrongfully convicted. He then moved to have the court recuse itself from hearing the motion for postconviction relief on the grounds that the correspondence was of a threatening and accusatory nature and that the judge was biased against him and should not have heard the motion for postconviction relief. We held that the defendant had the burden of showing that the court was actually biased or prejudiced and, hence, it was not sufficient to merely show that the court could have been biased or that an appearance of impropriety was created.

In *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993), we addressed what level of proof was needed to establish that an arbitrator was biased. We established that the partiality of an arbitrator was established when a " 'reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.' " *Id.* at 358, 495 N.W.2d at 43. We rejected the claim that a party claiming prejudice had to present " 'factual proof of bias.' " *Id.* We noted that one problem with strict application of the factual proof of bias approach is that absent an outright admission by a biased party, it may be impossible to show. We rejected the notion that partiality could be proved by the mere

" 'appearance of bias' " and, instead, adopted the "reasonable person" test. *Id.* We noted that judges and arbitrators were both subject to the same ethical standards and proceeded to address whether an arbitrator's failure to disclose a possible conflict of interest proved bias or prejudice against one party.

The federal courts have consistently applied the standard that we adopted in *Dowd* for determination of whether a judge was biased against a defendant. Pursuant to 28 U.S.C. § 455(a) (1994), a judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. *See Renteria v. Schellpeper*, 936 F. Supp. 691 (D. Neb. 1996). Therefore, under federal law, recusal is necessary if a reasonable person would harbor doubts about the judge's impartiality. See, also, *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (proposing objective test of impartiality); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) (holding that partiality is determined by whether reasonable person, knowing all facts, would question judge's impartiality); *U.S. v. Jordan*, 49 F.3d 152 (5th Cir. 1995) (holding that judge should have been recused because reasonable person would harbor doubts about judge's impartiality); *U.S. v. Cooley*, 1 F.3d 985 (10th Cir. 1993) (holding that inquiry is whether reasonable person would harbor doubts as to judge's impartiality). But see *U.S. v. Nelson*, 952 F.2d 180 (8th Cir. 1991) (holding that defendant did not establish that judge had pervasive

personal bias against defendant, and so impartiality was not questioned).

The reasonable person test adopted by this court in *Dowd* is a rational means of determining whether a judge is biased against a defendant. Therefore, in order for Pattno to prove that the trial judge was biased against him and that the judge should have recused himself from imposing a sentence, Pattno must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.

Pattno argues that the reading of the biblical scripture by the trial judge proved that he was biased against Pattno. The State argues that the judge's statements at sentencing did not reflect his personal views regarding homosexuality, but were merely personal observations made by the judge or, at least, were justified commentary on the heinousness of Pattno's crime. The State contends that since the sentence imposed on Pattno falls within the statutory guidelines, it is valid.

In *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991), the defendant was convicted of mail fraud, wire fraud, and conspiracy for encouraging persons to donate money to his television evangelism program. At sentencing, the judge stated: " '[Bakker] had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from [sic] moneygrubbing preachers or priests.' " (Emphasis omitted.) *Id.* at 740. The court of appeals, while noting that a sentencing judge has broad discretion in rendering a sentence, noted that such

discretion must be exercised within the boundaries of due process. The court held that the sentencing judge exceeded these boundaries by imposing a sentence based on impermissible considerations. The court noted that a judge may not take into consideration a party's race or national origin in sentencing without violating due process. The court held that "similar principles apply when a judge impermissibly takes his own religious characteristics into account in sentencing." *Id.* The court stated:

> Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing. . . .
>
> . . . .
>
> Yet, the fact remains that this case involves the explicit intrusion of personal religious principles as the basis of a sentencing decision; at least, that is not an unfair reading of the trial court's comments in this case. We recognize that a trial judge on occasion will misspeak during sentencing and that every ill-advised word will not be the basis for reversible error. In this case, however, our review of the sentencing transcript reveals comments that are, in the end, too intemperate to be ignored. Because an impermissible consideration was injected into the sentencing process, we must remand the case.

*Id.* at 740-41. We find the reasoning of *Bakker* helpful to our consideration of the trial judge's conduct in sentencing Pattno. Due process requires that sentencing judges consider only relevant information as the basis for a

sentence. See *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

Since our focus is whether a reasonable person under these circumstances would question the trial judge's impartiality, we examine the facts and circumstances in that light. All crimes in Nebraska are statutory. Similarly, sentences imposed upon defendants convicted of a crime are also statutory. No statute in this state criminalizes sexual contact between consenting adults of the same gender. Thus, Pattno's crime is that he had sexual contact with a minor; not that he had sexual contact with another male. Therefore, the biblical scripture which the judge read was not relevant to the crime to which Pattno pled guilty, and it should not have been considered by the judge in determining an appropriate sentence.

Also problematic with the trial judge's use of biblical scripture is the fact that from its very inception, this country has recognized the importance of separation of church and state. Allowing a court to recite scripture, and thereby proclaim its interpretation of that scripture, implies that the court is advancing its own religious views from the bench.

Statements of religious expression by a judge or remarks which suggest that the judge dislikes the crimes committed by a defendant do not necessarily evidence improper bias or prejudice. See, *Six v. Delo*, 885 F. Supp. 1265 E.D.Mo.1995), *affirmed* 94 F.3d 469 (8th Cir. 1996); *United States v. Baer*, 575 F.2d 1295 (10th Cir. 1978); *Poe v. State*, 341 Md. 523, 671 A.2d 501 (1996). However, courts are well advised to rely upon the statutory guidelines for imposing sentences. Reliance upon irrelevant material,

such as the court's own religious beliefs, could convince a reasonable person that a court was biased or prejudiced.

The problem is that during Pattno's sentencing, the trial judge read a biblical scripture and then stated that he had considered the circumstances and the "nature . . . of the defendant" in reaching the sentence of not less than 20 months' nor more than 5 years' imprisonment. A reasonable person who heard the judge's comments could have questioned the judge's impartiality.

In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997). A sentencing judge has broad discretion as to the source and type of information, including personal observations, which may be used as assistance in determining the kind and extent of the punishment to be imposed. See *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). However, relying upon one's personal religious beliefs as a basis for a sentencing decision injects an impermissible consideration in the sentencing process. See *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991).

When we examine the sentence in the context of Pattno's age, mentality, education, experience, social and cultural background and past criminal record; the nature of the offense; and the amount of violence involved in the commission of the crime, the following facts are significant: At the time of the occurrence, the victim was 13

years old. Although Pattno had no history of prior child molestation or sexual assault, the PSI revealed that he has had repeated contact with children, and the sexual adjustment inventory conducted revealed that he showed signs of pedophilia. There is evidence which suggests that Pattno continued to have contact with the victim even after he was arrested. The PSI did not contain a sentencing recommendation because Pattno failed to meet the threshold requirements to be considered for "Intensive Supervision Probation."

A Class IV felony is punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. There is no minimum sentence of incarceration or fine required. As such, Pattno's sentence is clearly within the statutory limits and generally, in view of such facts, would not be an abuse of discretion.

However, because the trial judge interjected his own religious views immediately prior to sentencing, a reasonable person could conclude that the sentence was based upon the personal bias or prejudice of the judge. If a judge's comments during sentencing could cause a reasonable person to question the impartiality of the judge, then the defendant has been deprived of due process and the judge has abused his or her discretion.

Therefore, we vacate the sentence imposed upon Pattno and remand the cause with directions that he be resentenced by a different judge.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

CONNOLLY, J., not participating.

**NEBRASKA SUPREME COURT**
**AND NEBRASKA COURT OF APPEALS**
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July 22, 1998

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**IN CASE OF:** S-97-1147, State v. Aaron Pattno

Appellee/Motion for Rehearing & Brf **filed** 06/15/98

**has been reviewed by the court and the following order entered:**

Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE
SUPREME COURT AND
COURT OF APPEALS